Supreme Court, U.S.
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No. 98-1695

IN THE

Supreme Court of the United States

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, *et al.*,

Petitioners,

v.

PRINCE GEORGE CENTER, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA

BRIEF IN OPPOSITION FOR RESPONDENTS UNITED STATES GYPSUM COMPANY AND W.R. GRACE & CO.-CONN.

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QUESTIONS PRESENTED

Where the state trial court directed that notice of a settlement be sent to class members by first class mail and publication, and where the state courts have found that a sophisticated class member aided by experienced counsel received actual notice of the class action on two separate occasions, should this Court grant certiorari to hear that class member's claims that it was entitled to "better than actual" notice?

Where the state trial court has found counsel to be adequate, where the appellate court has found that the issue of class counsel's adequacy had not been properly raised by a class member in the trial court and had been waived under state law, and where there is an insufficient evidentiary record to support a claim of inadequate representation, should this Court grant certiorari to hear a claim of constitutionally inadequate performance of class counsel in negotiating a settlement?

STATEMENT UNDER RULE 29.6

In accordance with Rule 29.6 of the Rules of this Court, respondent United States Gypsum Company states that its parent company is USG Corporation, and that there are no other publicly held companies that own over 10% of the stock of United States Gypsum Company.

In accordance with Rule 29.6 of the Rules of this Court, respondent W.R. Grace & Co.-Conn. states that its parent company is W.R. Grace & Co. which owns 100% of the stock of W.R. Grace & Co.-Conn.

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INTRODUCTION

Petitioner Prudential Insurance Company of America is dissatisfied with the settlements in this litigation and, after failing to exclude itself from the class, seeks to avoid the class action judgment by claiming that the Pennsylvania courts acted unconstitutionally. Prudential, however, did not raise below one of the two issues it seeks to raise in this Court, its assertions are contrary to the facts found by the Pennsylvania courts, and the circumstances here do not parallel those involved in the class actions discussed in Prudential's Petition.

This class action was filed in state court in 1986 and was hotly contested for the next decade. Unlike other class action settlements highlighted by Prudential, this case does not involve a settlement class. Indeed, the class was certified over defendants' vigorous objection and final settlements were reached only after intense negotiation with experienced asbestos and class-action counsel acting on behalf of the class.

Prudential contends that the notice of the settlements that was sent to it was constitutionally deficient. The Pennsylvania trial court expressly found as matters of fact, however, that: (a) Prudential and its lawyers had actual knowledge of the class action and of the potentially preclusive effect of a final judgment; and (b) Prudential received five copies of the notice of the final settlements. Hence, Prudential is necessarily arguing that, although it received actual notice, the Constitution requires better than actual notice. That is not, and never has been, the constitutional standard.

Prudential also asserts that it should not be bound by the settlements and judgment because it believes the performance of class counsel in reaching the settlements violated due process. In essence, Prudential claims that class counsel's performance was inadequate because the settlements were too low, as to Prudential, in light of Prudential's view of the value of its own claims. In so arguing, Prudential overlooks: (i) that it never objected to, or contested the fairness of, the settlements; (ii)

that the class was represented by experienced class action counsel as well as some of the nation's leading plaintiffs' attorneys in asbestos-in-buildings litigation; and (iii) that Prudential never notified class counsel of its claims (or its views of those claims) despite its knowledge of the case. Further, and perhaps most importantly, Prudential failed to raise in the trial court its claim that class counsel were constitutionally inadequate.

Prudential has conceded that "[t]he circumstances of this case are unique" and "the totality of these facts will never be repeated." This case and its unusual facts do not present a good vehicle to consider broad constitutional arguments or generalized attacks on class action abuse. Under this Court's rules and well established precedent, certiorari should not be granted.

STATEMENT OF THE CASE

A. Plaintiff Initiates The Class Action

This case was filed as a class action in 1986. The complaint alleged that plaintiff owned buildings with asbestos-containing building materials; that the presence of those materials posed a risk to health; and that the defendants (including U.S. Gypsum and Grace) should be held liable for compensatory and punitive damages.[1] Plaintiff sought to prosecute the case under Pennsylvania state class action procedures on behalf of all private owners of buildings leased to the United States government.

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1. Approximately eighteen months later, Prudential filed an action in the United States District Court for the District of New Jersey that raised similar claims. *Prudential Insurance Company of America, et al. v. United States Gypsum Company, et al.*, Civil Action Nos. 87-4227 (HAA) & No. 87-4238 (HAA) (referred to herein as "the New Jersey Case").

B. The Parties Extensively Litigate Issues Relating to Class Certification

U.S. Gypsum and Grace vigorously opposed class certification. Over their objections, the trial court granted the plaintiff's motion for class certification in 1992. Pet. App. 22a. The trial court held that the named plaintiff was an adequate class representative, that it had demonstrated the prerequisites for class certification, and that a class action was a fair and efficient means of resolving the controversy. The trial court determined that class counsel, who included Martin Greitzer, Harvey Kronfeld, the late Herbert B. Newberg,[2] Daniel Speights, and Edward Westbrook, were highly experienced in the prosecution of class actions and litigation involving asbestos in buildings; and it concluded that these lawyers would vigorously prosecute the action on behalf of the class.[3]

In 1993, defendants filed a petition in the Pennsylvania Supreme Court challenging, among other things, the certification of the class. That court declined to disturb the trial court's orders. In 1994, the case was reassigned to the highly-respected President Judge of the trial court. At that time, Grace, U.S. Gypsum and two other defendants moved for decertification of the class, but the trial court reaffirmed that the prerequisites to a class action still existed.

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2. In challenging the adequacy of class counsel in this case, Prudential repeatedly relies upon Mr. Newberg's class action treatise. Pet. 23, 24, 26.

3. In addition to other significant experience in asbestos litigation, these lawyers have played leading roles in the prosecution of two other major national asbestos-in-buildings class actions. *See In re School Asbestos Litigation*, 789 F.2d 996, 998 (CA3) (nationwide class of elementary and secondary schools), *cert. denied*, 479 U.S. 852, 915 (1986); *Central Wesleyan College v. W.R. Grace & Co*, 6 F.3d 177, 180 (CA4 1993) (nationwide class of colleges and universities). Further, Messrs. Greitzer, Speights and Westbrook have been involved extensively in asbestos-in-buildings litigation throughout the country.

C. Settlement Negotiations Begin After Substantial Discovery

Following class certification, the parties engaged in substantial discovery with an eye toward trial. A great deal of information was available to plaintiffs' counsel. After more than a decade of asbestos property litigation, class counsel had scrutinized the documents of U.S. Gypsum and Grace and deposed their employees repeatedly. They also were well aware of the strengths and weaknesses of asbestos-in-buildings claims. Scientific opinion regarding in-place asbestos-containing products had changed, and the Environmental Protection Agency and other agencies had modified their policies regarding asbestos-containing products in buildings. *See, e.g.*, S. Breyer, BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION, at 12-13 (1993) (discussing the development of scientific and regulatory knowledge regarding the nature of in-place asbestos-containing products). These changes benefitted the defendants in the litigation, resulting in favorable trial records for both U.S. Gypsum and Grace.[4] Against this background, the parties began to engage in settlement negotiations.

D. Prudential Actually Receives The First Class Notice

As of June 1994, settlements had been reached in this case with 24 of the 28 non-bankrupt defendants. U.S. Gypsum and Grace were not among this group. To allow final judgment to be entered on the claims against the settling defendants, the trial court modified the existing class certification to define two classes — a Settlement Class and a Trial Class. Class members could participate in either, neither, or both. The claims against the 24 settling defendants were certified as the Settlement Class, and the claims against the four non-settling defendants

4. As of 1996, U.S. Gypsum had tried 24 asbestos-in-buildings cases to verdict, 15 of which had ended in judgments in its favor, with two others settled and several remaining on appeal. Similarly, Grace had tried 16 cases on the merits since September 1989 and obtained nine jury verdicts in its favor.

(including U.S. Gypsum and Grace) were certified as the Trial Class. Pet. App. 23a-24a.

In February 1995, the trial court approved a form of notice to the class ("the 1995 Notice") that described the litigation, explained the 24 settlements and the certification of the Settlement Class, and advised class members that the Trial Class had been certified and was proceeding against U.S. Gypsum, Grace, and two other defendants. The 1995 Notice also informed class members that they were required to file a written request for exclusion if they did not wish to be included in the Settlement Class. The 1995 Notice was sent by mail to 36,383 potential class members and published in nine newspapers nationwide. The list of potential class members' addresses was created by class counsel, based upon records of federal agencies obtained under the Freedom of Information Act.

Prudential admits that it received the 1995 Notice and filed a request to be excluded from the Settlement Class.[5] Pet. App. 26a. Nothing in Prudential's request for exclusion sought exclusion from the Trial Class or instructed class counsel to provide future notices in a different manner. After a hearing, the court approved the 24 settlements and dismissed the claims against the 24 settling defendants.

On the heels of submitting its request for exclusion from the Settlement Class, and with full knowledge that it would ultimately need to take further action to avoid being bound by the adjudication of the Trial Class claims, Prudential consulted with its outside attorneys regarding its options with respect to the Trial Class. Pet. App. 26a. On or about May 10, 1995, Prudential's lawyers drafted a letter for Prudential to consider using to request exclusion from all further aspects of the case. Pet. App. 26a, 61a-62a.

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5. Prudential asserts in its petition for Certiorari that the notice that it received was "forwarded by an unrelated third party." Pet. 3. Prudential previously asserted in a verified Petition filed in the trial court that "[a] notice was sent to a Prudential office located in Dallas, Texas." Resp. App. 11a.

The draft letter is factually significant for several reasons. First, it specifically acknowledged Prudential's awareness of "'conditionally certified' classes[.]" Second, despite seeking exclusion from any certified classes, the draft letter was fashioned in an attempt to preserve Prudential's flexibility to participate if it determined the outcome of the class action to be desirable. Finally, it explicitly identified Steven Lauer, a Prudential attorney, as the person to whom any future notification should be directed. Pet. App. 61a. Based upon this draft letter and other evidence of record, the Superior Court of Pennsylvania concluded as a matter of fact that "Prudential was aware of this action and the proper method for extricating itself from it." Pet. App. 9a.

Prudential concedes, and the Pennsylvania courts found, that Mr. Lauer's draft letter was never sent to the trial court or class counsel. Pet. App. 6a, 26a. Prudential attributes this to "oversight or mistake." (Affidavit of Steven A. Lauer (October 28th, 1996), at 2 & 3.) The trial court, however, found that this was a tactical decision, noting that when Prudential's outside counsel drafted its "request that it be allowed to participate in this case on an opt-in basis, [Prudential] was contemplating the possibility it would be better off as a member of the trial class than as an individual litigant." Pet. App. 52a. The Superior Court did not disturb this finding of fact.

Regardless of Prudential's reason for not sending the draft letter, it is clear that neither Prudential nor its outside counsel took any steps to notify class counsel of its claims or otherwise exclude itself from the Trial Class. Indeed, Mr. Lauer testified in an affidavit that after May 1995, he gave the case "no further thought."

E. Prudential Actually Receives The Second Class Notice

After approving the initial 24 settlements, the trial court entered a series of case management orders designed to move the claims of the Trial Class to trial. With the litigation risk becoming clearer, plaintiffs negotiated and ultimately entered

into settlement agreements with U.S. Gypsum and Grace regarding the claims of the Trial Class.

The President Judge of the trial court, assisted by a special master, took an active role in shaping the notice program for the Trial Class settlements and entered orders approving the form of the second notice to the class ("the 1996 Notice"). As with the 1995 Notice, the 1996 Notice summarized the claims and defenses in the case, described the status of the litigation, and explained the terms of the settlements. The 1996 Notice also explained the steps class members were required to take to exclude themselves from the Trial Class, including return of an enclosed written exclusion request by July 8, 1996.

The 1996 Notice warned class members that unless they requested exclusion from the Trial Class, their claims would be dismissed with prejudice and they would "be forever barred from asserting any claim against [the settling defendants] . . . by reason of alleged asbestos-containing materials installed in any Class Building owned by a Trial Class member. . . ." The 1996 Notice also stated that opting out of the prior Settlement Class or prosecuting individual litigation did not obviate the need for filing a written request for exclusion. Pet. App. 6a, 27a-28a.

Under the supervision of the trial court, the 1996 Notice was disseminated in four ways: (a) it was mailed to "each potential Trial Class Member . . . who is included in the list of names of all such potential Trial Class members last known to plaintiffs"; (b) it was published in nine major newspapers; (c) it was published in five commercial real estate trade publications; and (d) it was published on a special Internet web site. Pet. App. 27a. The list of persons to whom notice was mailed was the same list used for the 1995 Notice.

Seven copies of the class notice were sent to Prudential. Pet. App. 6a, 28a. The trial court and Superior Court found that five copies of this notice were delivered to separate Prudential

properties.[6] Pet. App. 11a. Although 289 requests for exclusion were filed before the court-ordered deadline, Prudential did not file such a request. Pet. App. 6a, 28a.

Pursuant to Pennsylvania procedure, the trial court held a settlement "fairness hearing."[7] The court reaffirmed its findings regarding class certification (including its finding that the class was adequately represented), concluded that the settlements were fair, and approved the settlements.[8] Prudential did not object to the settlements or appear at the hearing.

After the settlements became final, counsel for U.S. Gypsum and Grace promptly sought to have Prudential (which had not excluded itself) agree that those claims subsumed within the Trial Class would no longer be at issue in the New Jersey Case. Prudential refused to do so and instead initiated the proceedings in state court that led to this petition.

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6. The Superior Court's opinion incorrectly states that this occurred in May 1995, when the context of the statement indicates that the court was clearly referring to the 1996 Notice.

7. Prudential asserts inaccurately that counsel for U.S. Gypsum and Grace misled the trial court by informing it that all class members' claims "were likely 'nominal.' " Pet. 7. The brief to which Prudential refers merely described the potential weaknesses in the claims of the group of 36,000 potential class members as a whole, asserting that "some class members . . . may have suffered minimal . . . damages because of" government reimbursement and that "other class members will be unable to document actual abatement expenses. . . ."

8. The total of these settlements was $7,740,000. Prudential's assertion that the settlement will provide $125 per claimant is particularly disingenuous in light of its argument that settlements of this nature yield extremely low claim rates. *Compare* Pet. 19 *with* Pet. 23. The ultimate payment to Prudential will obviously depend on the nature and number of claims asserted. There has been no agreement between defendants and class counsel regarding fees, and the amount of fees awarded to class counsel will be determined following a hearing before the trial court in which Prudential may participate.

F. Prudential Seeks A Post-Judgment Declaration Of Exclusion From The Class

On September 30, 1996, Prudential filed in the trial court a petition for declaration that it was not a class member (the "Petition for Declaration"). Resp. App. 1a. Prudential's Petition for Declaration focused on issues not raised in its Petition for Certiorari: (1) an alleged ethical or other duty on the part of U.S. Gypsum and Grace or their counsel to help Prudential by informing its outside counsel in the New Jersey Case that it should opt out of the Trial Class; and (2) a claim that by pursuing its own litigation, Prudential should be "deemed" to have opted out. Resp. App. 15a-17a.

Prudential asserts in this Court that its Petition for Declaration raised a constitutional claim of inadequate representation by class counsel. Pet. 7. This statement is not accurate. Indeed, class counsel are mentioned only once in the Petition for Declaration, and there are no factual allegations that counsel failed to perform in a constitutionally adequate manner. In its unverified memorandum of law filed with the Petition for Declaration, Prudential devoted approximately two pages to "reserv[ing] its argument" regarding various issues that Prudential stated "need not be currently resolved."[9] Prudential devoted one paragraph to a "reservation" on the issue of adequacy of counsel. The argument that Prudential purported to reserve is not the federal constitutional argument raised in this Court, but rather whether class counsel failed to meet Pennsylvania class action standards enunciated in two Pennsylvania state court cases, *Klusman v. Bucks County Court of Common Pleas*, 564 A.2d 526 (Pa. Commw. 1989), *aff'd*, 574 A.2d 604 (Pa. 1990), and *DiLucido v. Terminix*

9. Prudential refers to language that it claims to be in its verified Petition for Declaration, but actually appears in an accompanying unverified memorandum of law. Under Pennsylvania law, there is an important distinction between a verified petition, which establishes the facts and an unverified memorandum of law, which has no such value. Pa. R. Civ. P. 206.1 & 206.3.

International, Inc., 676 A.2d 1237 (Pa. Super.), *appeal denied*, 684 A.2d 557 (Pa. 1996). Neither *Klusman* nor *DiLucido*, however, bears upon the adequacy of class counsel under the Due Process Clause; *DiLucido* is concerned with the "typicality" requirement of the Pennsylvania Rules of Civil Procedure, and *Klusman* addresses the question whether the named plaintiff, not class counsel, was an adequate representative under the Pennsylvania Rules of Civil Procedure.

Thus, Prudential's Petition for Declaration did not raise or address the constitutional adequacy of class counsel. Moreover, Prudential expressly informed the trial court that it was not seeking to attack the settlements or the judgment, stating: "the relief sought by Prudential does not implicate the final judgment" in the case. Letter from A. Raynes to Special Master Daniel Murphy (Nov. 18, 1996).

On October 30, 1996, Prudential filed a supplemental petition and supporting memorandum of law. Prudential again did not raise any issues relating to a claim of inadequate performance by class counsel, stating that as to the issues on which it had "reserved" its rights, "Prudential continues to believe that it need not address these issues at this time."

Following a three-hour oral argument, the special master asked the parties to advise the court whether further discovery was necessary. Prudential responded that "[i]n light of the unique nature of Prudential's circumstances and the discrete relief it has sought here, we believe no discovery is required to resolve Prudential's motion."[10] Prudential never asked the court to rule on its "reserved" adequacy argument.[11]

10. Prudential's response to the special master also stated that "if the Court believes Prudential's motion cannot be granted on these limited grounds, we respectfully reserve the opportunity to participate in full discovery. . . ." Prudential did not indicate what discovery it "conditionally" wished to pursue.

11. Prudential also failed to offer probative evidence in support

(Cont'd)

G. The Trial Court Denies Prudential's Requested Relief

On November 27, 1996, the trial court denied Prudential's Petition for Declaration. Prudential filed a verified Petition for Reconsideration in which it sought to press for the first time an argument regarding class counsel's performance. No averments of fact in the Petition for Reconsideration, however, addressed the issue raised in this Court that class counsel had a duty to investigate Prudential's claims or those of any of the other 36,000 class members before settling the class action. Moreover, in the brief accompanying the Petition for Reconsideration, Prudential again devoted only one paragraph to adequacy of counsel, citing only *Klusman* and *DiLucido*. As a result, Prudential again failed to raise the federal constitutional issue which it now purports to raise in this Court. The trial court denied the Petition for Reconsideration.

Prudential thereafter filed a notice of appeal to the Superior Court of Pennsylvania. Among the fifteen issues raised by Prudential was adequacy of representation "by the named plaintiffs and class counsel[.]" Pursuant to Pennsylvania procedure, the trial court issued an opinion addressing the questions on appeal identified by Prudential. With respect to the facts at issue in this Court, the trial court found as matters of fact that Prudential had actual knowledge of the class action; that it had received notice of the settlements with Grace and U.S. Gypsum; and that Prudential was responsible for its own failure to opt out, stating that to the extent that Prudential "operated in the dark, it pulled the curtain down on itself." Pet. App. 43a.

(Cont'd)
of the merits or value of its claims in the New Jersey Action. The only documents submitted to the trial court that referenced Prudential's damages were the summary sheets from expert reports in the New Jersey Case. These hearsay documents were submitted without any backup or supporting evidence. There is no evidence that these inflated damage claims bear any relation to actual damages. Nor do these numbers account for the significant defenses that exist to Prudential's claims.

On the issue of notice, the trial court held that "[o]f the seven notices mailed to [Prudential] buildings the Post Office returned two." Pet. App. 28a. Citing Pennsylvania law regarding the presumption of delivery, the trial court found that "the other five were delivered." Pet. App. 28a.

Apparently out of an abundance of caution, the trial court also addressed those issues which were untimely raised in the Petition for Reconsideration. The trial court noted that "[Prudential] blandly asserts that its Newark action involves a claim of more than $330,000,000" and assumes "it has a winner despite the fact that in recent years building owner asbestos plaintiffs are encountering greater difficulty in establishing liability and damages." Pet. App. 51a. The trial court then rejected Prudential's claim regarding adequacy of representation. Pet. App. 54a-55a.

H. The Superior Court Affirms The Trial Court

After issuance of the trial court's opinion, Prudential prosecuted its appeal to the Pennsylvania Superior Court, which affirmed the trial court's orders. The court held that only those issues "properly raised" in Prudential's original Petition for Declaration had been preserved for review under Pennsylvania law. Pet. App. 7a. Finding that the issue of adequacy of class counsel was not raised in the Petition for Declaration, the Superior Court held that the issue was not properly before it. Pet. App. 8a.

On the issue of notice, the Superior Court found that:

> Prudential had notice of the substance of this action in April 1995. It obtained the advice of counsel and was presumably aware of the ramifications of a failure to opt out of the action. It is undisputed that further notice, specifically concerning the instant settlement, was delivered to five separate Prudential properties. . . . Pet. App. 11a.

The Superior Court noted that although actual receipt of class notice is not necessary to bind a class member to a final judgment, Prudential did receive such actual notice, which the court regarded as sufficient to dispose of Prudential's claim. Pet. 16a. The court nonetheless addressed Prudential's arguments, observing that, under *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), the appropriate inquiry is whether the notice was reasonably calculated to give effective notice to the Trial Class as a whole. According to the court, the analysis was to be done prospectively, not employing an after-the-fact analysis of the facts relating to one specific class member. The Superior Court also concluded that the publication notice served as an effective supplement to the approximately 36,000 individual notices that were sent.

I. The Pennsylvania Supreme Court Denies Review

Prudential next sought review by the Supreme Court of Pennsylvania arguing, *inter alia*, that the performance of class counsel raised constitutional concerns. On December 8, 1998, the Pennsylvania Supreme Court denied Prudential's Petition for Allowance of Appeal.

REASONS FOR DENYING THE WRIT

I. CERTIORARI SHOULD BE DENIED BECAUSE THE PENNSYLVANIA COURTS FOUND AS A FACTUAL MATTER THAT PRUDENTIAL RECEIVED ACTUAL NOTICE

Prudential asks this Court to review the decision of the Superior Court of Pennsylvania and rule that a sophisticated party, aided by experienced counsel, that received actual notice on two separate occasions, has been deprived of its due process rights as a result of not receiving "better than actual" notice. Prudential, however, has not cited a single case from any court to support the argument that one who receives actual notice and whose lawyers know about the case has a due process right

to better notice. Even if this Court desires to address constitutional constraints concerning how notice is directed to class members, a case in which the complaining party received notice is not the proper vehicle.

A. The Evidence Of Actual Notice Is Overwhelming.

The Pennsylvania courts found *as a matter of fact* that Prudential received actual notice of the 1996 settlements and that its lawyers had been aware of the class action since at least 1995. In seeking certiorari, Prudential disputes those findings. The rules of this Court make clear, however, that "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings." S. Ct. Rule 10.

The facts found by the state courts are that Prudential actually received the 1995 Notice. Pet App. 5a, 26a. Consistent with the requirements of *Phillips Petroleum Co. v. Shutts,* 472 U.S. 797 (1985), the 1995 Notice described the action (including the certification of the Trial Class), described class members' rights, and provided each class member an opportunity to exclude itself from the Settlement Class.

Prudential was fully capable of exercising its right to opt out of the 1995 Settlement Class and, in fact, did so. The trial court found that Prudential also understood that the Trial Class was going forward, and that it was a member thereof, as evidenced by the fact that Prudential, in conjunction with its outside counsel, prepared a request that it be excluded from the case. Pet. App. 9a. In addition, the draft letter expressly asked that Prudential be provided further notice through Steven Lauer, the intended signatory. Pet. App. 61a-62a. The text of the draft letter thus directly undermines Prudential's assertion that it believed its request for exclusion form (filed in response to the 1995 Notice) was sufficient to inform the court that Prudential desired that future notice be sent to Mr. Lauer.

In mid-1996, Prudential was sent the 1996 Notice regarding the settlement of additional class claims (including claims

against U.S. Gypsum and Grace). That notice explained that the pendency of another action would not serve to exclude a class member from the Trial Class. Again, this notice actually reached Prudential. Indeed, the state courts found that five copies were delivered to Prudential's properties. Pet. App. 11a. According to Prudential, however, the 1996 Notice failed to reach the single member of its legal staff that it deemed to be the ideal recipient of the notice. For this reason, Prudential takes issue with the Pennsylvania courts' findings that it received notice.

This Court generally does not "grant a certiorari to review evidence and discuss specific facts." *Texas v. Mead*, 465 U.S. 1041, 1043 (1984) (quoting *United States v. Johnston*, 268 U.S. 220, 227 (1925)). It is "appropriate to decline to review a decision that turns on details of the evidence that are not likely to be duplicated in other cases." *Vasquez v. United States*, 454 U.S. 975, 977 (1981) (opinion of Stevens, J.).

This is particularly true where, as here, a lower court's factual findings have been affirmed by an appellate court. "[T]his Court has frequently noted its reluctance to disturb findings of fact concurred in by two lower courts." *Rogers v. Lodge*, 458 U.S. 613, 623 (1982). Indeed, this Court has held that it "cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *Berenyi v. District Director, Immigration & Naturalization Service*, 385 U.S. 630, 635 (1967) (citations and internal quotations omitted).

Prudential has asserted no such "obvious and exceptional showing." To the contrary, Prudential asks this Court to review the evidence and discuss the specific facts of the notice afforded class members in this case. The Pennsylvania courts have consistently found that Prudential received *actual* notice — better than the "best practicable notice under the circumstances." There is simply no good reason for this Court to abandon its practice of declining to review factual findings.

B. The Notice In This Case Was Consistent With This Court's Instruction That Class Members Be Afforded The "Best Practicable Notice."

In the face of the lower courts' findings that it received actual notice, Prudential tries to transform this purely factual issue into a constitutional question. Prudential asserts that it lacks "specific guidance" about the type of notice required to satisfy due process. Pet. 12. "Guidance," however is unneccessary on the question of whether a class member who received actual notice is entitled to better than actual notice; Prudential has failed to cite any authority which supports that remarkable proposition.

Ignoring its receipt of actual notice, Prudential asserts that the lower courts' decisions concerning the notice program constituted a "misreading" of the Court's decision in *Shutts*. Pet. at 28. This Court's rules make clear, however, that certiorari is "rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law." S. Ct. R. 10. In any event, Prudential makes no showing that the notice program here — first class mail to the addresses compiled by means of Freedom of Information Act requests, supplemented by broad publication[12] — was inconsistent with due process requirements enunciated by this Court.

This Court has consistently instructed lower courts that notice, when required, should be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950); *see Shutts*, 472 U.S. at 811-12.

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12. The notice included publication in nine major newspapers, five commercial real estate trade publications and on an Internet site. Pet. App. 27a. This type of publication is regularly considered a means reasonably calculated to notify absent class members. *E.g.*, *Eisen v. Carlisle and Jacquelin*, 417 U.S. 156, 174-77 (1974) (publication and mail together provide best practicable notice).

While token efforts or "mere gestures" do not accord with due process, *Mullane*, 339 U.S. at 315, the standard does not require a finding that every absent plaintiff actually *received* notice, "so long as class counsel acted reasonably in selecting means likely to inform persons affected." *In re Prudential Sec. Inc. Ltd. Partnership Litig.*, 164 F.R.D. 362, 368 (S.D.N.Y.), *aff'd*, 107 F.3d 4 (CA2 1996), *cert. denied*, 117 S. Ct. 2509 (1997).

The "best practicable notice" requirement is based on reasonableness — it is a fluid concept that can be applied to a multitude of factual scenarios. As such, it is necessarily flexible for application to a broad range of cases without the need for this Court to micro-manage each and every factual situation. Here, the Superior Court properly applied this Court's teaching in determining that the notice program met the constitutional standards, even if actual notice is not received. Pet. App. 14a.

Prudential also attempts to create the appearance of a conflict between the decision of the Pennsylvania Superior Court and the decisions of other courts. However, none of the cases that Prudential references involve findings of actual notice of the sort found in this case. The reference in Rule 10 to conflicts among decisions has been construed to require that there "be a real or 'intolerable' conflict on the same matter of law or fact, not merely an inconsistency in dicta or in the general principles utilized." R. Stern, E. Gressman, S. Shapiro & K. Geller, SUPREME COURT PRACTICE, § 4.3 at 167 (7th ed. 1993). No such conflict exists in this case.

Finally, Prudential invokes cases in which the Court evaluated the constitutional adequacy of notice to a single party (as opposed to a class). Again, however, the striking and unique facts of this case distinguish Prudential's claim. For example, Prudential cites *Robinson v. Hanrahan*, 409 U.S. 38 (1972), where this Court held that the notice was constitutionally inadequate because "the State knew that appellant was not at the address to which the notice was mailed and . . . that appellant could not get to that address since he was at that very time

confined in the Cook County jail." As is readily apparent, the facts of this case are in no way analogous to *Robinson*.

Similarly, Prudential cites *Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478 (1988), a case involving a probate law that allowed claims to be extinguished based solely upon published notice. Unlike this case — in which seven notices were sent by mail to Prudential — no effort at mailed notice was attempted in *Pope*. *Id.* at 491.

Prudential also compares its situation to that of an incompetent taxpayer who was known to be "without mental capacity to handle her affairs or to understand the meaning of any notice served upon her." *See Covey v. Town of Somers*, 351 U.S. 141 (1956). Prudential, however, is a highly sophisticated entity and was represented by one of New Jersey's largest law firms. It clearly had the "mental capacity" to understand the multiple notices that were actually delivered to it.[13]

Thus, the unique facts of this case place it well outside the range of constitutional concerns that this Court expressed in the cases cited by Prudential.

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13. Prudential is an odd standard bearer to advance the claims in its Petition, in that it has benefited from taking contrary positions in class actions across the country in which it was the settling defendant. *See, e.g., In re Prudential Securities Inc. Ltd. Partnership Litig.*, 164 F.R.D. 362 (S.D.N.Y.) (denying late exclusions from class settlement to individuals who lacked notice because Prudential provided an incorrect address), *aff'd*, 107 F.3d 4 (Table), *cert. denied*, 117 S. Ct. 2509 (1997).

II. CERTIORARI SHOULD BE DENIED BECAUSE PRUDENTIAL NEITHER PROPERLY RAISED NOR DEVELOPED AN EVIDENTIARY RECORD REGARDING THE ADEQUACY OF COUNSEL ISSUE BELOW AND BECAUSE THERE IS NO CONFLICT AMONG THE LOWER COURTS ON THIS ISSUE

This Court generally does not address arguments that were not the basis for the decision below, *Matsushita Elec. Indus. Co., Ltd. v. Epstein*, 516 U.S. 367, 379 n.5 (1996). Prudential failed properly to raise below the issue of the constitutional adequacy of counsel, and the Superior Court did not reach the issue. Even if Prudential had raised the issue of constitutional adequacy of counsel, Prudential has not shown that this case presents a "flagrant misuse of class actions," Pet. 18, or, for that matter, any conduct that warrants intervention by this Court.

A. Prudential Has Failed To Preserve Its Claim That Class Counsel Inadequately Negotiated The Settlement Of The Claims Of The Trial Class.

This Court has stated that, with "very rare exceptions," it "will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision[.]" *Adams v. Robertson*, 520 U.S. 83, 86 (1997) (*per curiam*) (collecting cases). Under *Adams* and the cases cited therein, Prudential has the "burden of showing that the issue [it seeks to raise] was properly presented" to the highest state court. *Id.* To meet this burden, the petitioner must specify in the statement of the case

> the stage in the proceedings . . . at which the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed upon by the courts . . . with specific reference to the places in the record where the matter appears . . . as will show that the federal question was timely and properly raised.

S. Ct. R. 14.1(h). To the extent that the issue is not addressed by the state appellate court, there exists a presumption "that the omission was due to want of proper presentation in the state courts, unless the aggrieved party . . . can affirmatively show the contrary." *Exxon Corp. v. Eagerton*, 462 U.S. 176, 181 n.3 (1983) (citations and internal quotations omitted). Indeed, this Court has held it lacks jurisdiction to review issues raised only in appellate briefing and not decided by the appellate court. *Id.*

Prudential has failed to show that the adequacy issue it wishes to raise was properly presented in the state courts. The Superior Court explicitly held that it lacked authority to consider the adequacy of representation claim because no such claim had been presented until the petition for reconsideration, which under settled Pennsylvania procedure cannot be used to raise new grounds.[14] Pet. App. 8a (citing *In re Merrick's Estate*, 247 A.2d 786, 787 (Pa. 1968); *Provident Nat'l Bank v. Rooklin*, 378 A.2d 893, 897 (Pa. Super. 1977)). Although Prudential claims that the Superior Court incorrectly concluded that it failed to raise an issue of adequacy in its initial Petition for Declaration, a simple review of Prudential's Petition for Declaration confirms that Prudential did not present either a claim regarding the

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14. To the extent Prudential suggests it is free to raise the adequacy issue at any time during the course of the litigation regardless of whether the issue has been properly preserved, there is no support for such a contention. *Epstein v. MCA, Inc.*, 126 F.3d 1235 (CA9 1997), cited by Prudential, has been recently withdrawn in an opinion concluding that "the absent class members' due process right to adequate representation is protected not by collateral review, but by the certifying court initially, and thereafter by appeal within the state system and by direct review in the United States Supreme Court." *Epstein v. MCA, Inc.*, 1999 WL 3595311 *7 (CA9 June 7, 1999). Moreover, the withdrawn *Epstein* opinion involved a collateral challenge in district court to a judgment based upon class counsel's inadequacy, not an effort to raise on appeal issues that were not raised in the trial court. Thus, even the withdrawn *Epstein* opinion does not support the contention that an absent class member may sidestep appellate jurisprudential rules.

adequacy of counsel's performance (constitutional or otherwise) or facts in support thereof. Resp. App. 1a.

Under Pennsylvania practice, "fact pleading" is required; it is not enough for a party presenting a petition merely to make conclusory assertions in a brief. Rather, petitioner must assert affirmatively in the verified petition those facts upon which the petitioner will rely. Pa. R. Civ. P. 206.1. It also is well established under Pennsylvania law that an issue which is not raised in a verified petition cannot be considered. *See, e.g., Warren Savings Bank & Trust Co. v. Foley*, 144 A. 84, 85 (Pa. 1928) (collecting cases); *see also Fisher v. King*, 25 A. 1029 (Pa. 1893) ("Any attempt to impeach or set aside a judgment for matters outside the record should be permitted only after a plain issue has been made up by petition verified by affidavit, with answer responsive thereto."); *see also State Camp of Pennsylvania of Patriotic Order, Sons of America v. Kelley*, 110 A. 339, 340 (Pa. 1920).

Prudential makes a further factual error in asserting that the argument raised in its Petition for Reconsideration and in the Superior Court addressed adequacy of the representation as a constitutional matter. To the contrary, as stated above, the two Pennsylvania cases Prudential cited in its state court briefs concerned Pennsylvania class action requirements; those cases did not address federal constitutional issues regarding the adequacy of counsel's performance.

In apparent recognition of its waiver problem, Prudential cites two criminal cases for the proposition that a state court may not insulate itself from Supreme Court review by avoiding a properly framed issue. The cases Prudential references, however, bear no relation to this case. The first case, *Johnson v. Mississippi*, 486 U.S. 578, 587 (1988), was based upon evidence establishing that a state appellate court was only sporadically enforcing the particular procedural bar that was purported to insulate the state decision from review. There is no suggestion that this case presents a similar situation. The second, *Wright v. Georgia*, 373 U.S. 284, 289 (1963), concerned unique state procedural laws, the complexity of which caused criminal defendants routinely to be denied review of

constitutional claims. This case, by contrast, turns on the straightforward procedural rule requiring a party to raise all of its claims before a court decides the matter. Prudential's original Petition makes clear that it made a tactical judgment simply to "reserve" and not raise certain issues, including an argument relating to adequacy.

B. Even If Prudential Did Not Waive Its Adequacy Claim, It Has Not Made A Factual Record To Support That Claim.

There are sound policy reasons for this Court's requirement that an issue be raised and decided below: (1) "questions not raised below are those on which the record is very likely to be inadequate, since it certainly was not compiled with those questions in mind"; (2) the state court should have the first opportunity to pass on federal challenges; and (3) the federal question might have been "blocked by an adequate state ground," making this Court's review unnecessary. *Cardinale v. Louisiana*, 394 U.S. 437, 439 (1969). Here, Prudential has failed to create a record sufficient to support analysis of its claims.

Prudential spends a large part of its Petition discussing generally the potential for conflicts between the interests of class counsel and those of class members. These hypothetical conflicts may be of academic interest, but they bear no relation to the record in this case. The heart of Prudential's argument is that class counsel were inadequate because they failed to make a "reasonable inquiry about the existence and value" of the possible individual claims of each and every absent class member before negotiating a settlement. As such, Prudential does not contest the trial court's determinations at the time that the case was certified (and recertified) that class counsel were performing adequately. Rather, Prudential appears to argue that the performance of class counsel in settling a case is subject to an after-the-fact evaluation on the basis of individual class members' subjective beliefs about their claims. There is no reason for this Court to create constitutional standards

concerning the extent to which negotiated, arms-length settlements must conform to the subjective *post hoc* expectations of passive class members.

Further, and most importantly, Prudential presented no evidence below that would support a finding that class counsel actually failed to perform adequately in its representation of the class as a whole. Lacking factual support, Prudential has attempted to argue by inference.

Prudential claims that class counsel performed inadequately because "a two-minute Westlaw or Lexis search would have unearthed [Prudential's] claims," Pet. 19, suggesting that class counsel's failure to conduct research regarding Prudential (and the other 36,000+ potential claimants) makes the judgment unenforceable as a federal constitutional matter. Had class counsel searched in Westlaw for all cases with "Prudential" in the caption and "asbestos" in the text, it would have found thirty-six opinions (as of the date of final approval of the settlements). If class counsel had then examined the two published decisions to which Prudential refers, it would have received no information about whether the Prudential buildings at issue in the New Jersey Case included government tenants (the operative factor in determining whether a building fell within the class definition). It is hard to understand how this search could have been conducted in only two minutes, how class counsel could conduct a similar function for all of the members of the class, or how such a search was necessary in order for class counsel's performance to be constitutionally adequate.

Prudential also suggests that class counsel's performance in negotiating the settlement was constitutionally inadequate *per se*, solely due to the size of Prudential's asserted claim in the New Jersey Case. In short, Prudential argues that it cannot be bound because the settlements are not large enough as a matter of constitutional principle. Prudential, however, did not offer to the trial court any objective evidence about the merits of the claims or defenses in the New Jersey Case. Rather,

Prudential stated to the trial court, as it does here, what it subjectively believes its claim to be worth. Prudential now argues that the Constitution requires that the settlements be judged in light of this subjective belief. The trial court, however, understood the distinction between actual, demonstrated damages and unsupported claims. Moreover, the trial court specifically ruled that it would have approved the settlements even if it had been aware of Prudential's claims in the New Jersey Case. Pet. App. 52a.

Finally, Prudential implies that class counsel were the victims of an elaborate scheme by defendants to obscure Prudential's claims. This is an entirely inaccurate picture. Class counsel were well situated to understand the value and nature of Prudential's claims. Class counsel included some of the leading asbestos-in-buildings lawyers in the nation, who have been involved not only in major class actions but also in numerous asbestos cases that have been tried or settled by individual building owners. As such, they were intensely familiar with the facts and law concerning these claims and were in a strong position to evaluate the strengths, weaknesses, and value of the claims of the class as a whole.

In sum, even if Prudential had not waived any claim relating to adequacy of representation, the factual record does not support the inferences that it now seeks to have this Court draw. Accordingly, a proper record does not exist to support an inquiry into the constitutional issue that Prudential seeks to raise.

C. Even If Prudential Had Made A Factual Record Concerning Its Claims of Inadequate Counsel, There Is No Conflict Among The Lower Courts On The Issue Presented To This Court.

Apparently mindful of the general precept that in reviewing a petition for certiorari this Court considers whether the petition presents a conflict among federal courts and state courts of last resort on important issues of federal law, S. Ct. Rule 10(b), Prudential attempts to manufacture a conflict where none exists.

Prudential mistakenly suggests that *Epstein v. MCA, Inc.*, 126 F.3d 1235 (CA9 1997), *withdrawn*, 1999 WL 359511 (CA9 June 7, 1999), can be read to stand for the proposition that class counsel have a constitutional obligation to conduct an independent investigation of the claims of each individual class member prior to negotiating a settlement. Pet. 16-17.

The *Epstein* opinion, cited by Prudential, imposed no such duty on class counsel. Rather, that opinion turned largely on its unique facts — what the panel termed "an extraordinary set of circumstances." *Id.* at 1255. Those unique circumstances related, *inter alia*, to class counsel's alleged failure to evaluate the federal claims of the class as a whole and counsel's alleged denigration of those class-wide claims in order to secure a settlement. In no way did that opinion address Prudential's argument that class counsel had an obligation under the due process clause to review and evaluate *particular* class members' claims as part of the settlement process.

In any event, the *Epstein* decision cited by Prudential has been withdrawn, and the Ninth Circuit has issued a substituted opinion in which it has reversed its previous conclusion. *Epstein v. MCA, Inc.*, 1999 WL 359511 (CA9 June 7, 1999) ("*Epstein III*"). In doing so, the Ninth Circuit observed that this Court's statements in *Matsushita Electric Industrial Co. v. Epstein*, 516 U.S. 367 (1996), "in no way imply that a class member who fails to opt out is not bound until collateral review of the adequacy of representation reveals that due process has been satisfied. . . ." *Id.* at *8. According to the court in *Epstein III*, "[N]owhere in *Shutts* did the Court state or imply that where the certifying court makes a determination of the adequacy of representation . . . , this determination is subject to collateral review." *Id.* at *6. The Ninth Circuit concluded that due process did "not support the broad collateral review that the Epstein appellants seek," and that "the certifying court is charged with protecting

the interests of absent class members." *Id.* at *7. Based on these principles, the Court held that the class members' "challenge to the adequacy of representation in the [state court class action] proceedings was answered by specific reference to the findings made on the issue in those proceedings." *Id.* at *9.

Thus, *Epstein III* fails to create any conflict with the opinion of the Superior Court. In no way does it suggest that class counsel had an obligation to evaluate Prudential's individual claim prior to settlement. Moreover, *Epstein III* fully supports defendants' position in this case because issues concerning adequacy of representation were fully litigated on multiple occasions in the state court class action.

Contrary to Prudential's argument, the lower state and federal courts are consistent in holding that counsel is not inadequate for failure "to consider the unique interests and damages" of an individual class member. *Lazy Oil Co. v. Witco Corp.*, 166 F.3d 581, 590 (CA3 1999). Although counsel cannot adequately represent all class members if there is a significant conflict among them, *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625-26 & n.20 (1997), a disagreement over the amount or proper division of funds in a settlement, standing alone, does not typically create such conflict. *Walsh v. Great Atlantic & Pacific Tea Co., Inc.*, 726 F.2d 956, 964 (CA3 1983); *Laskey v. International Union, United Auto., Aerospace & Agricultural Implement Workers of America*, 638 F.2d 954, 957 (CA6 1981). Thus, the dissatisfaction of some class members with class counsel's efforts does not establish a conflict. *Lazy Oil*, 166 F.3d at 590-91. The Pennsylvania Superior Court's decision is entirely consistent with the decisions of the lower federal courts.[15]

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15. Moreover, the Superior Court is not the "state court of last resort" in Pennsylvania. Thus, even if the decision below could be construed to be inconsistent with the federal decisions cited by Prudential, this case does not create the type of conflict envisioned by Rule 10(b). This is further evidenced by the distinction drawn between a "state court of last resort" and a "lower state court that is subject to discretionary review by the state court of last resort" in Rule 13.1.

III. CERTIORARI SHOULD BE DENIED BECAUSE PRUDENTIAL'S ARGUMENTS REGARDING ABUSE OF STATE COURT CLASS ACTIONS HAVE NO APPLICATION TO THIS CASE.

In an effort to come within Rule 10's "important federal question" criterion, Prudential cobbles together a mixture of law review articles, congressional testimony, and one dissenting opinion from a federal court of appeals in support of the proposition that "the proliferation of state class actions has heralded a proliferation of abuses." Pet. 10. This argument is misdirected for at least four reasons.

First, the authorities Prudential cites describe what Prudential believes to be an alleged upswing in collusive state court class actions, suggesting that state courts may be less mindful of the importance of adequacy of representation. Pet 10. This case cannot support that proposition; it involves no collusion. This was not a settlement class, or even a litigation class that settled shortly after filing. To the contrary, the case and class certification were contested vigorously by defendants for almost a decade, with their objections being repeatedly raised and overruled. The final class definition for purposes of the settlement was in no material way different from the class definition proposed by plaintiffs, opposed by defendants, and approved by the trial court over the defendants' objections on at least two separate occasions.

Second, there is no evidence that the trial court was in any way passive in its supervision of the case. In fact, the court was exceedingly active, particularly about the content and distribution of class notice. Nor is there any evidence that class counsel were other than diligent in their preparation of this case.

Third, Prudential cites no evidence suggesting that these settlements were other than arms-length transactions. The suggestion that these settlements were "a tool for cunningly destroying" Prudential's rights is utterly groundless. Defendants had no way of knowing when they agreed to these settlements

whether Prudential would choose to exclude itself. Having failed timely to object after twice receiving notice, Prudential cannot claim that this settlement was "crammed down the throats of objectors." Pet. 12.

Fourth and finally, Prudential argues that state courts are desperately in need of guidance from this Court on the proper procedures for conducting class actions. Apart from conflicting with principles of federalism, Prudential's position is starkly inconsistent with the reality of this case. Pennsylvania's class action rules are based upon Rule 23 of the Federal Rules of Civil Procedure and the Pennsylvania state courts have repeatedly emphasized their reliance on federal precedent in construing Pennsylvania's class action rules. *Janicik v. Prudential Ins. Co. of America*, 451 A.2d 451, 454 n.3 (Pa. Super. 1982); *Cambanis v. Nationwide Ins. Co.*, 501 A.2d 635, 637 (Pa. Super. 1985). The state court opinions in this case are particularly instructive in this regard as they rely almost exclusively on federal class action precedents to resolve Pennsylvania class-related issues. Thus, even if Prudential's derogatory characterization of the capabilities and motivations of state courts can be supported by one or two well chosen anecdotes, this case presents no reason to doubt the conclusion reached in the primary authority cited by Prudential: "With rare exceptions, trial judges do their jobs and certify class representatives capable of representing the interests of absent class members." *Epstein*, 126 F.3d at 1256. In this case, the class action procedure was employed in a manner wholly consistent with both federal constitutional mandates and general federal procedure.

CONCLUSION

As Prudential informed the Supreme Court of Pennsylvania, "[t]he circumstances of this case are unique" and "the totality of these facts will never be repeated." As such, any determination of the Court in this case is unlikely to have wide applicability to other cases. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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